

DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the District of Columbia Department of Transportation, pursuant to the authority of Section 7 of the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, effective February 15, 2005 (D.C. Act 16-43), or any substantially identical successor legislation ("Act"); Mayor's Order 2005-34 (February 22, 2005); Section 3(b) of the Department of Transportation Establishment Act of 2002, effective May 21, 2002 (D.C. Law 14-137; D.C. Official Code § 50-921.02(b)); and Mayor's Order 2003-11 (January 16, 2003), hereby gives notice of the adoption on an emergency basis of an amendment to Title 24, "Public Space and Safety," by adding a new Chapter 26. The new chapter will require that any carrier engaged in the transportation of certain ultra-hazardous materials within 2.2 miles of the United States Capitol obtain an Ultra-Hazardous Materials Transport Permit. The chapter further describes the permit application procedures; outlines enforcement and adjudication provisions; and establishes a schedule of fines associated with violations of the Act, chapter, and permit.

This emergency action is based on the threat of a terrorist attack near the U.S. Capitol through the use of extremely large shipments of ultra-hazardous materials transported by motor vehicle or rail car. The emergency rulemaking, which redirects the ultra-hazardous materials away from the Capitol via practical alternative routes and allows for the issuance of permits authorizing such shipment in special cases, is necessary for the immediate protection of the public health and justifies emergency action.

This emergency rulemaking was adopted on March 18, 2005, and became effective immediately on that date. However, the emergency rulemaking will not apply to rail carriers until April 11, 2005, and will not apply to motor vehicle carriers until certain issues regarding preemption are resolved.

The Director also gives notice of intent to take final rulemaking action to adopt this rulemaking in not less than thirty (30) days from the date of publication of this notice in the D.C. Register.

The emergency rulemaking will expire on July 16, 2005, or upon publication of a Notice of Final Rulemaking in the D.C. Register, whichever occurs first.

TITLE 24 DCMR, Public Space and Safety, is amended by adding a new Chapter 26 to read as follows:

CHAPTER 26 TRANSPORTATION OF ULTRA-HAZARDOUS MATERIALS

2600 ULTRA-HAZARDOUS MATERIALS TRANSPORT PERMIT

2600.1

Except as provided in § 2600.4, no carrier shall move a rail car or motor vehicle containing any of the following within the Capitol Exclusion Zone without an Ultra-Hazardous Materials Transport Permit issued by the Department:

- (a) Explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 kilograms;
- (b) Flammable gasses of Class 2, Division 2.1, as designated in 49 C.F.R. § 173.2, in a quantity greater than 10,000 liters;
- (c) Poisonous gasses of Class 2, Division 2.3, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.116; or
- (d) Poisonous materials, other than gasses, of Class 6, Division 6.1, in a quantity greater than 1,000 kilograms, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.133.

2600.2

Except as provided in § 2600.4, no carrier shall move a rail car or motor vehicle within the Capitol Exclusion Zone without a Hazardous Materials Transport Permit issued by the Department that:

- (a) Is capable of containing explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 kilograms, and has exterior placarding or other markings indicating that it contains such materials;
- (b) Is capable of containing flammable gasses of Class 2, Division 2.1, as designated in 49 C.F.R. § 173.2, in a quantity greater than 10,000 liters, and has exterior placarding or other markings indicating that it contains such materials;
- (c) Is capable of containing poisonous gasses of Class 2, Division 2.3, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.116, and has exterior placarding or other markings indicating that it contains such materials; or
- (d) Is capable of containing poisonous materials, other than gasses, of Class 6, Division 6.1, in a quantity greater than 1,000 kilograms, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.133, and has exterior placarding or other markings indicating that it contains such materials.

2600.3 There shall be two (2) types of Ultra-Hazardous Materials Transport Permits:

- (a) Single-trip permit: Covers a one-time movement by a carrier of:
 - (1) Ultra-hazardous material by rail car(s) or motor vehicle(s) within the Capitol Exclusion Zone; or
 - (2) Ultra-hazardous material by empty rail car(s) or motor vehicle(s) within the Capitol Exclusion Zone.
- (b) Annual permit: Covers for one (1) year:
 - (1) Recurring movements within the Capitol Exclusion Zone by a carrier of an ultra-hazardous material moved from the same point of origination to the same point of termination; or
 - (2) All movements within the Capitol Exclusion Zone by a carrier of empty rail cars or motor vehicles, provided the carrier shall present documentation upon request by the Director or his designated representative sufficient to verify the empty rail cars or motor vehicles.

2600.4 No carrier shall be required to obtain an Ultra-Hazardous Materials Transport Permit if the Director has declared an emergency.

2601 ULTRA-HAZARDOUS MATERIALS TRANSPORT PERMIT APPLICATION PROCEDURES

2601.1 The carrier shall complete a permit application for an Ultra-Hazardous Materials Transport Permit provided by the Public Space Management Administration.

2601.2 In addition to such other information as the Public Space Management Administration may request, the permit application for an Ultra-Hazardous Materials Transport Permit shall include the following information:

- (a) Type of ultra-hazardous material to be moved within the Capitol Exclusion Zone;
- (b) Whether a rail car or motor vehicle will move the ultra-hazardous material within the Capitol Exclusion Zone;
- (c) Route of the rail car or motor vehicle moving the ultra-hazardous material, including points of origination and termination;
- (d) Statement and supporting documentation explaining why there is no practical alternative route that can be used to move the ultra-hazardous material;
- (e) Emergency contact information; and
- (f) Statement establishing that by signing the application, the carrier attests that the information provided on the application is true and complete.

2601.3 The carrier shall submit the completed Ultra-Hazardous Materials Transport Permit application to the Public Space Management Administration.

2601.4 After review and analysis of the information provided on the completed Ultra-Hazardous Materials Transport Permit application and upon receipt of the appropriate permit fee, the Director may:

- (a) Issue a permit upon a demonstration that there is no practical alternative route; or
- (b) Deny the permit.

2601.5 If the Director denies the permit application, the carrier may appeal the Director's denial by filing a request for a hearing with the Office of Administrative Hearings within fifteen (15) days after the Director's denial was issued.

2601.6 If the Ultra-Hazardous Materials Transport Permit is denied by the Director, the carrier may request that the Director reconsider the permit application. A request for reconsideration shall not act to stay the time for filing a request for hearing under § 2601.5.

2601.7 The Ultra-Hazardous Materials Transport Permit shall expire:

- (a) Single-trip permit: Seven (7) days after the designated date of movement of the ultra-hazardous material;

- (b) Annual permit: Three hundred sixty-five (365) days after the date of issuance.

2601.8 The Ultra-Hazardous Materials Transport Permit fee shall be:

- (a) Single-trip permit: Three hundred dollars (\$300);
- (b) Annual permit: One thousand dollars (\$1,000).

2602 ENFORCEMENT AND ADJUDICATION

2602.1 An enforcement action for any violation of the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit shall be commenced with a written Notice of Violation (NOV) issued to any person deemed appropriate by the Director.

2602.2 The NOV shall be in the form prescribed by the Director and shall contain:

- (a) The name and address of the respondent;
- (b) A citation to the law or rule that the respondent allegedly violated;
- (c) The nature, time, and place of the violation;
- (d) The amount of the penalty applicable to the violation;
- (e) Notification that the penalty must be paid within fifteen (15) days from the date of service of the NOV; and
- (f) A statement explaining that the respondent has a right to request a hearing on the violation charged in the NOV; and
- (g) The procedure by which the respondent may request a hearing on the violation charged in the NOV.

2602.3 The Director shall effect service of the NOV on a respondent by one of the following methods:

- (a) Personal service on the respondent or respondent's agent;
- (b) Delivering the NOV to the last known home or business address of the respondent or respondent's agent and leaving it with a person over the age of sixteen (16) years old residing or employed therein; or

- (c) Mailing the NOV to the last known home or business address of the respondent or respondent's agent. For purposes of this section, "respondent's agent" means a general agent, employee, or attorney of the respondent.

2602.4 A respondent shall answer the NOV in accordance with this section within fifteen (15) days from the date of service of the NOV. In response to an NOV, a respondent shall do the following:

- (a) Admit the violation and enclose the amount of the fine stated on the NOV by use of a personal check, company check, certified check, cashier's check, postal money order, or bank money order made payable to the order of the District of Columbia Treasurer; or
- (b) Deny the commission of the violation and request a hearing to contest the violation.

2602.5 If a respondent has been served an NOV and fails, without good cause, to answer within fifteen (15) days from the date of service, the respondent shall be liable for the penalty applicable to the violation.

2602.6 Upon receipt of a respondent's answer denying the commission of a violation and requesting a hearing, the Director shall commence a case before the Office of Administrative Hearings and that case shall be adjudicated pursuant to the regulations of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code § 2-1821 *et seq.*).

2603 SCHEDULE OF FINES

2603.1 Any person found in violation of the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit shall be subject to penalties in accordance with the following schedule:

- (a) First offense: Ten thousand dollars (\$10,000);
- (b) Subsequent offenses: Twenty-five thousand dollars (\$25,000).

2603.2 Each violation shall be treated separately. When the violation is a continuing one, each day of the violation constitutes a separate offense.

2603.3 The Director may temporarily suspend or revoke an Ultra-Hazardous Materials Transport Permit when it can be demonstrated that a carrier has violated the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit.

2603.4 If any person fails to pay any penalty, costs, or interest due as the result of any violation of the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit, the Director may use any method described in section 8(f) of the Litter Control Administration Act of 1985, effective March 6, 2002 (D.C. Law 14-78; D.C. Official Code § 8-807(f)) (2004 Supp.) to obtain payment.

2604 APPLICABILITY

2604.1 Beginning on April 11, 2005, this chapter shall apply to carriers who own locomotives used in providing transportation of ultra-hazardous materials.

2604.2 This chapter shall not apply to a carrier who owns a motor vehicle (excluding the trailer) used in providing transportation of ultra-hazardous materials until thirty (30) days after:

- (a) A court or Federal agency with jurisdiction has determined that the Act is not preempted by 49 U.S.C. § 5125 or 49 C.F.R. § 397.69;
- (b) The Director certifies that the criteria listed in 49 C.F.R. § 397.71 have been met; or
- (c) A waiver of preemption has been granted pursuant to 49 C.F.R. §§ 397.213 and 397.219.

2699 DEFINITIONS

2699.1 When used in this chapter, the following terms and phrases shall have the meanings ascribed below:

Act – the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, effective February 15, 2005 (D.C. Act 16-43), or any substantially identical successor legislation.

Capitol Exclusion Zone – all points within 2.2 miles of the United States Capitol building, except for land located beyond the geographic boundaries of the District of Columbia.

Carrier – the person who owns the locomotive or motor vehicle (excluding the trailer) used in providing transportation of ultra-hazardous materials.

C.F.R. – Code of Federal Regulations.

Department – the District of Columbia Department of Transportation.

Director – the Director of the District of Columbia Department of Transportation.

District – the District of Columbia.

Emergency – an unanticipated, temporary situation that threatens the immediate safety of individuals or property.

Empty Rail Car or Motor Vehicle – A rail car or motor vehicle that is capable of containing ultra-hazardous material, has exterior placarding or other markings indicating that it contains such material, and contains less than one percent (1%) by capacity or volume of any ultra-hazardous material.

Motor Vehicle – any vehicle propelled by internal-combustion engine, electricity, or steam, other than a vehicle designed to run only on rails or tracks, that is intended or used for moving freight, merchandise, or other commercial loads or property. A motor vehicle shall include any trailer attached to the motor vehicle.

Person – an individual, corporation, company, firm, agency, association, partnership, organization, or commercial entity. The term also includes a trustee, receiver, assignee, personal representative, or authorized agent thereof.

Practical Alternative Route – a route that lies entirely outside of the Capitol Exclusion Zone and whose use would not make movement of ultra-hazardous material cost-prohibitive.

Public Space Management Administration – an administration within the Department that is responsible for the issuance of public space permits, or any successor District government entity.

Rail Car – any vehicle without motor power that is intended or used for moving freight, merchandise, or other commercial loads or property on rails or tracks and is drawn by locomotive.

Trailer – a vehicle without motor power intended or used for carrying freight, merchandise, or other commercial loads or property and drawn or intended to be drawn by a motor vehicle, whether such vehicle without motor power carries the weight of the property wholly on its own structure or whether a part of such weight rests upon or is carried by a motor vehicle.

Transportation – movement of a rail car or motor vehicle within the Capitol Exclusion Zone.

Ultra-Hazardous Material – explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 kilograms; flammable gasses of Class 2, Division 2.1, as designated in 49 C.F.R. § 173.2, in a quantity greater than 10,000 liters; poisonous gasses of Class 2, Division 2.3, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.116; or poisonous materials, other than gasses, of Class 6, Division 6.1, in a quantity greater than 1,000 kilograms, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.133.

U.S.C. – United States Code.

All persons interested in commenting on the subject matter of this proposed rulemaking action may file comments, in writing, with: Lars Etzkorn, Associate Director, District Department of Transportation, 2000 14th Street, N.W., 5th Floor, Washington, D.C. 20009. Comments must be received no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Copies of this proposal may be obtained, at cost, by writing to the above address.